is implemented. This type of delay will surely cause consumer confusion and dissatisfaction.

The Commission's NPRM also seeks comments on the use of time-of-day restrictions for telemarketers. This type of system is not commonly used to protect consumers that do not wish to receive telephone solicitations. Rather, time-of-day restrictions are often used by states to ensure reasonable business practices and to protect against unscrupulous or harassing solicitors and debt collectors. Furthermore, as recognized by the Commission, time-of-day restrictions are already voluntarily complied with by most telemarketers as "good business etiquette."[22] While these types of restrictions might protect consumers from the occasional abusive telemarketer, they will probably not sufficiently meet consumers or Congress' expectations of protecting subscriber privacy in accordance with the TCPA.[23]

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[22] NPRM at 15. Furthermore the Direct Marketing Association Guidelines specify that "telephone marketers should avoid making contacts during hours which are unreasonable to the recipients of the calls." DMA's Guidelines for Ethical Business Practice, Article 4. This is generally regarded to mean calls should be limited to 9:00 a.m. to 9:00 p.m., a practice Olan Mills observes.

[23] The Commission correctly notes that any time of day system more restrictive than 9:00 a.m. to 9:00 p.m. would "likely be overly burdensome on legitimate business activities, difficult to monitor and offer, little, if any, additional benefits." NPRM at 15. However, because these are precisely the hours when most reputable telemarketers make solicitations, this system would do little to prevent solicitations to consumers who have no desire to receive them at any hour.

In fact Olan Mills questions whether time-of-day restrictions would meet the requirements of the TCPA. The statute directs the Commission to issue regulations "to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object."[24] With a fixed time-of-day restriction, there is no opportunity for individual subscribers to object. To promulgate a rule, even for 9:00 a.m. to 9:00 p.m., the Commission would have to presume that all subscribers object to calls outside these hours and do not object to calls within these hours. Farmers, for example might prefer 7:00 a.m. to 7:00 p.m. to better coincide with the hours of daylight.

In addition, although Olan Mills already abides by the Direct Marketing Association Guidelines, and thus does not conduct solicitations before 9:00 a.m. or after 9:00 p.m., the company still would oppose promulgation of time-of-day restrictions. If this or a future Commission attempted to tighten the restricted hours, such as to create some sort of a "national dinner hour" during which telemarketing calls would be prohibited, the consequences for Olan Mills and tens of thousands of businesses like it would be disastrous. Promulgation of any time-of-day rule, even an innocuous one initially, would create a troublesome precedent, placing the

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[24] TCPA at § 3(c)(1).

Commission in the position of hearing countless proposals in the future for setting business hours. Moreover, Federal action in this area may be interpreted as an invitation to state and local governments to legislate similar ordinances, especially in light of the TCPA's provision permitting stricter state standards.[25]

Finally, Olan Mills believes that a time-of-day restriction is particularly unnecessary if the Commission adopts the company-specific DNC system. A company assured of only one call to the consumer will not want to waste it by calling late at night, waking the consumer up, and prompting a "please don't call me again" request.

III. THE ESTABLISHED BUSINESS RELATIONSHIP REQUIRES REGULATORY DEFINITION, THE COMPLEXITY OF WHICH WILL BE DETERMINED BY THE OPTION SELECTED BY THE COMMISSION

The Commission should be aware of a problem that exists under TCPA, and was not addressed in the NPRM, but which could create substantial public discontent if not remedied in the Commission's final rules. Specifically, the problem concerns the definition of "telephone solicitation" and its exclusion of calls made where there is an existing business relationship with the subscriber. Under the statute, the

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[25] For example, a local ordinance in Newton, Iowa already restricts commercial solicitation to hours of 8:00 a.m. to 6:00 p.m. See Newton Code of Ordinances, Title VII, Chapter 1, Article 1, § 7.1.011.

Commission can regulate calls from most telemarketers, unless there is an existing business relationship between the telemarketer and the consumer. However, the legislation fails to define what constitutes such a relationship. Congress specifically left this difficult task to the Commission.

Specifically, the question arises as to how the subscriber can end the established business relationship? Such a definition is necessary so that consumers can invoke their right to discontinue solicitations by a particular company. It would be an absurd result if the most irritating calls -- those where there is a pre-existing relationship that the consumer wants to escape -- cannot be ended by the consumer. However, the company-specific DNC method may absolve the Commission from having to enact regulations defining how this relationship begins and is terminated by the consumer.

The legislative history clearly indicates that Congress did not intend for business to be able to continue soliciting existing customers ad infinitum. Congress expected the Commission to promulgate what amounts to a company-specific DNC provision as a disengagement mechanism for consumers who want to terminate an existing business relationship.[26] In

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[26] The House Committee report stated:

(continued...)

other words, companies must institute a mechanism whereby existing customers can discontinue further solicitations, regardless of whether they participate in a national database.

Olan Mills believes that such a result is reachable under the statute as worded. In order for the Commission to define the scope of regulated activity under the TCPA, it must define by regulation when a preexisting business relationship ends and when "telephone solicitation" begins. Therefore, the Commission can incorporate in the final rule a provision declaring that an existing business relationship with a specific company is terminated for purposes of TCPA when the consumer indicates that they do not want further

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[26](...continued)
The Committee emphasizes that businesses should not view the presence of an established relationship as absolute relief from subscribers' privacy requests. If a subscriber asks a company with whom it has an established relationship not to call again, the company has an obligation to honor the request and avoid further contacts. Despite the fact that objecting subscribers can be called based on an "established business relationship," it is the strongly held view of the Committee that once a subscriber objects to a business that calls based on an established relationship, such a business must honor this second objection and implement procedures not to call that twice-objecting subscriber again. Businesses calling established customers who object to unsolicited calls must remember that these are subscribers who have made a predetermination that they will not be receptive to unsolicited telemarketing. The telephone subscriber's second objection, which is a company-specific objection, must be respected by that company. The Committee expects the FCC to address this matter within the required rulemaking. House Report at 15-16.

solicitations from the company. Thus, to avoid a nonsensical outcome, the Commission must --- at a minimum --- create a company-specific DNC system as a disengagement mechanism for consumers in existing business relationships.

This approach has another attractive feature for the Commission. If the Commission also adopts the company - specific DNC system to restrict telemarketing solicitations where there is no existing business relationship, then the same system will apply in all cases. That is, a telemarketer can contact a consumer until he requests the company not call again, whether or not an existing business relationship exists. This approach not only has the advantage of simplicity, but also obviates the need for the Commission to define what constitutes an existing business relationship, how to treat corporate affiliations, and any other measure of the duration of the established business relationship. The existing business relationship would still be outside the realm of regulated activity, but only as long as it exists. The relationship is severed if the consumer asks the telemarketer not to call again.

On the other hand, if the Commission adopts a national database system, each individual telemarketer will need to keep a list of its existing customers, and to check that list against the national database to enable the telemarketer to continue contacting those individuals. Once a consumer

objects to further solicitations -- thus severing the existing relationship -- the telemarketer should refrain from contacting that consumer again, regardless of whether the consumer opts to enroll in the database. Thus, telemarketers could have two categories of prohibited consumers -- those that have objected to receiving any solicitations, and those objecting to solicitations by the specific telemarketer. It remains unclear whether the telemarketer receiving an objection to a solicitation has a responsibility to report that objection to the database administrator, thus ending all solicitations to that consumer.

Furthermore, if the Commission adopts the database, it must also enact rules defining the scope of established business relationship. For instance, how long does the relationship last? Most likely, this question should be answered in terms of the specific product being marketed. For example, beauty supply products are purchased much more frequently than real estate. With regard to follow up solicitations by the same company marketing different or even somewhat related products, are the customers of the first product existing customers for the second? And how should the Commission define solicitations by corporate subsidiaries? With regard to corporations that are engaged in multiple lines of businesses, is a customer for one subsidiary a customer for all, or should the transactions or

products be related? These are difficult questions for which Olan Mills does not have all of the answers. However, the company has attempted to draw some guidelines which may be useful to the Commission in considering these issues:

- The House Energy and Commerce Committee believed that a subsequent solicitation by the same telemarketer "must be substantially related to the product or service which formed the basis of the prior relationship."[27] The test adopted by the Committee was grounded in the consumer's expectation of receiving the subsequent call.

- The subsequent solicitation must be within a reasonable period of time after the initial transaction. In any case, this period of time should not be greater than two years.

- As envisioned by the Committee, solicitations by affiliated companies should be the exception, not the rule.[28] Again, the test for affiliated calling would be whether the consumer would reasonably expect to receive a solicitation from the affiliate. A solicitation by an affiliate of the company originally having the business relationship should be permissible only if the solicitation was substantially related to the product or service forming the basis of the original relationship.

Clearly, most of these thorny issues can be avoided by the Commission's adoption of the company-specific DNC mechanism. Moreover, such an approach would create an opportunity for otherwise exempt organizations (e.g. political and charitable) to voluntarily participate through an organizational specific "Do Not Call" program. The other options are not as easy to implement on a voluntary basis.

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[27] House Report at 14.

[28] Id. at 15.

IV. THE COMMISSION SHOULD CLARIFY DISTINCTIONS BETWEEN ITS AUTOMATED AND LIVE OPERATOR TELEPHONE SOLICITATION RULES

The TCPA contains proscriptions for two separate categories of telephone solicitations: 1) those using automated calling devices alone or in conjunction with an artificial or prerecorded voice[29]; and 2) telephone solicitations using live operators.

Olan Mills is concerned that live operators using advanced equipment may be brought under the first category when in fact they should fall under the second category of rules. Therefore, Olan Mills requests that the Commission make several clarifications to its proposal to ensure that the rules do not effectively prohibit the use of automated, advanced equipment to facilitate live operator solicitations.

First, the meaning of the term "automatic dialing system" as used in the TCPA should be clarified. The statute refers to systems that have the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator. . . ."[30] Olan Mills' concern is that this definition might be read to include systems used by live operators to facilitate dialing from a list of numbers fed into and stored in the system. While these telephone numbers

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[29] This type of equipment is commonly known in the industry as an ADRMP -- Automated Dialing and Recorded Messaging Player.

[30] TCPA at § 3(a)(1).

might be dialed on a random basis, they are not randomly selected from the universe of all possible telephone numbers, but from the targeted marketing lists of the company.

The legislative history indicates Congress' concern was over systems that internally generate numbers with no regard as to the eventual end user. In particular, Congress was concerned about the use of automatic dialing systems soliciting emergency numbers, hospitals, and paging services.[31] The Commission should clarify that the definition does not include systems that call from an externally-fed database that is designed to omit from the sequence calls to emergency lines, cellular service, paging service, etc. Without this clarification, a single error in a database of numbers could subject the business to strict liability and a $500 penalty.

Second, the distinction between an "automatic dialer" and an ADRMP should be clarified. For example, the NPRM refers to prohibitions on the use of auto dialers[32] when in fact the statute prohibits the use of an "artificial or pre-recorded voice to deliver a message."[33] In practice, live operators often use automatic dialers to facilitate calling, but not ADRMPs.

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[31] House Report at 10.

[32] NPRM at 3.

[33] TCPA at 3(b)(1)(A).

Finally, the Commission requested comment on its proposal to create an existing business relationship exception to the restrictions on the use of auto-dialers and pre-recorded message players.[34] Olan Mills would encourage adoption of such an exception, but notes that the Commission's authority to grant this exemption does not extend to any calls that include the transmission of an unsolicited advertisement.

IV. CONCLUSION

Congress clearly believed that the Commission would carefully consider all of the alternatives in developing a system to protect subscriber privacy rights. However, the Commission should be careful to ensure that any regulations adopted pursuant to the TCPA carefully balance the expectations of subscribers against the need of legitimate telemarketers. When viewed in this light, Olan Mills is

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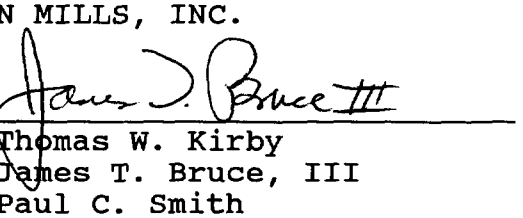
[34] NPRM at 5-6.

confident that the Commission will conclude that a company-specific DNC will best effectuate this result.

Respectfully submitted,

OLAN MILLS, INC.

By 

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